

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0585, Duryco, LLC d/b/a Paul Davis Restoration of Central New Hampshire v. Denis Cloutier, the court on December 17, 2004, issued the following order:

The defendant, Denis Cloutier, appeals an order of the trial court finding that he violated his contract with the plaintiff, Duryco, LLC d/b/a Paul Davis Restoration of Central New Hampshire. He contends that the trial court erred in interpreting and applying the contract's non-competition provision and in determining the amount of the damage award. We affirm.

The defendant argues that the trial court erred in finding that the plaintiff had a legitimate proprietary interest in or entitlement to the clients with whom the defendant established a relationship during the period of non-competition. Whether the plaintiff had a proprietary interest is a question of fact; accordingly, we defer to the trial court on this issue and will not set aside its findings of fact unless they are unsupported by the evidence or erroneous as a matter of law. See McCabe v. Arcidy, 138 N.H. 20, 24 (1993) (integral part of process of decision-making includes resolving conflicts in testimony, measuring credibility of witnesses and determining weight to be given to testimony). The record includes evidence that, when the defendant began his employment with the plaintiff, the plaintiff had a business relationship with Concord Group and the defendant had no relationship with Concord Group and no experience in the field of work for which he was hired. The employment contract provided that the defendant had been assigned certain accounts that were "valuable assets of the Corporation" and prohibited him from contacting those accounts after termination of the contract. Based on the evidence, we find no error in the trial court's ruling.

The defendant also argues that the trial court erred in modifying the damage provision of the parties' contract. The court found that a blanket application of the damage provision to the period when the defendant purported to be working for the plaintiff while also servicing the plaintiff's clients through his own business was equitable. The court also found, however, that the projected award for the subsequent period when the defendant had left the plaintiff's employment would be unreasonable because the defendant worked longer hours than might be expected of his successor and his work went beyond the geographic limits of the non-competition provision. See Concord Orthopedics Prof. Assoc. v. Forbes, 142 N.H. 440, 445 (1997) (modification or partial enforcement of employment contract upon showing of good faith in employment contract's execution may be appropriate if in public interest). In this case, the

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trial court found that the parties negotiated the terms of their employment contract, amending and deleting some provisions; the trial court found no evidence that the plaintiff had not acted in good faith in executing the contract. Based on the record before us, we sustain the trial court's ruling.

Finally, the defendant contends that the trial court's decision was neither supported by the record nor by its findings and rulings. In support of this argument, the defendant: (1) suggests that he misconstrued the language of the court's preliminary injunction; and (2) speculates that the trial court may have awarded damages for work that was outside the geographic limits of the non-competition provision. Having reviewed the record before us, we find no merit in these arguments.

Affirmed.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

**Eileen Fox,
Clerk**

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